IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

FRIDAY, THE TWENTY FOURTH DAY OF MARCH
TWO THOUSAND AND SIX

PRESENT

THE HON'BLE MR JUSTICE J.CHELAMESWAR

AND
THE HON'BLE MR JUSTICE M.VENKATESWARA REDDY

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WRIT PETITION No.23113 OF 2004

Between:

Smt.T.Violetamma, W/o.Ratna Sabhapathi,

Aged about 48 years, Occ: Head Nurse,

E.S.I. Hopsital, Adoni, Kurnool District.

..... PETITIONER

AND

P.Suvarthamma, W/o.V.H.Satya Babu,

Aged about 50 years, Occ: Head Nurse,

E.S.I. Hospital, Adoni, Kurnool District,

And others.

....RESPONDENTS

THE HON'BLE MR JUSTICE

J.CHELAMESWAR

AND
THE HON'BLE MR JUSTICE

M.VENKATESWARA REDDY

WRIT PETITION No.23113 OF 2004

O R D E R

(Per Sri Justice J.Chelameswar)

The petitioner, 1st respondent and five others were appointed as Staff Nurses in Zone-IV as described under the Presidential Order, 1974. The said post of Staff Nurse is one of the posts which is a part of the service constituted and governed by the Andhra Pradesh Insurance Medical Subordinate Service Rules, framed under Article 309 of the Constitution of India vide G.O.Ms.No.5, Health, Medical and Family Welfare (ESI), dated 02.01.1989. When the petitioner and 1st respondent and some others were recruited, the above-mentioned service did not exist. In spite of a specific question from the Court, none of the counsel appearing in this writ petition could point out as to how the petitioner, 1st respondent, and others (who are not before the Court) were brought into this service. There is another service governed by the Andhra Pradesh Nursing Service Rules, which is constituted and governed by the Rules framed in exercise of the power under Article 309 of the Constitution of India in G.O.Ms.No.2035, Health, Housing & Municipal Administration Department, dated 27.09.1965.

All the learned counsel appearing in the matter proceeded on the presumption that the petitioner and 1st respondent were initially appointed in the service constituted under 1965 Rules and thereafter, they were 'absorbed' into the Indian Medical Subordinate Service by some magical process of law, the details of which are not available before the Court today.

On 11.02.1999 a provisional seniority list of 29 members working as Staff Nurses in Zone-IV was prepared by the 3rd respondent herein. In the said provisional seniority list, the petitioner herein was shown at Sl.No.6 and the 1st respondent at Sl.No.3. It can be seen from the provisional seniority list, the first eighteen members of the list were recruited prior to the coming into force of the Insurance Medical Subordinate Service Rules and the remaining members after coming into force of the said Rules.

The provisional seniority list was communicated to all the 29 members inviting their objections, if any. It appears, some objections were received which includes the objections by one B.M.V.Krupavathi. The objections of the petitioner were over-ruled and she was informed by proceedings dated 2.03.1999 that the seniority list was prepared as per 'roaster points but not basing on their joining report …". Pursuant to the rejection of the objections, a final seniority dated 24.03.1999 was prepared and communicated to all the above-mentioned 29 persons.

Based on the said final seniority list, it appears that the 1st respondent was promoted to the next higher post of Head Nurses in the A.P. Insurance Medical Subordinate Service Rules. Challenging the said promotion, B.M.V.Krupavathy filed O.A.No.3680 of 1999 claiming that she was senior to the above-mentioned P.Suvartamma and two others, who are shown as respondents in the O.A., with a further prayer that the Director of Insurance Medical Services be directed to promote B.M.V.Krupavathy as Head Nurse with effect from the date on which the unofficial respondents therein were promoted.

The question whether B.M.V.Krupavathy was senior to the unofficial respondents therein or not was not decided by the Tribunal as the O.A. came to be disposed of at the admission stage even without notice to the unofficial respondents therein with an order as follows:

> " Considering the submissions made by both sides, the applicant is directed to make a representation/appeal to the Government within a period of 4 weeks from today with regard to her grievance and claim for placement in the seniority list and on receipt of such representation/appeal the Government is directed to examine the same as per rules and pass appropriate orders within a period of three months from the date of receipt of representation/appeal. The O.A. is accordingly disposed of at the admission stage."

Pursuant to the said order, B.M.V.Krupavathy made a representation to the Government, which came to be disposed of by the Government by its proceedings dated 17.04.2001. The appeal was allowed by the Government without giving any specific reason. The relevant portion of the order reads as follows:

> " After examining the appeal petition filed by Smt.B.Krupavathy, Staff Nurse, it has been decided to allow the appeal petition and to restore her seniority duly showing her place at Sl.No.2 below to Smt.G.Rebecamma and above Smt.G.Kanakamma."

It must be noted that the case of B.Krupavathy was that she joined the service on 16.06.1979 and the three respondents in the above-mentioned O.A. joined later. Whether the date of joining the service is relevant factor or not is a question, which can be considered later and the fact remains that the appeal was allowed declaring that the respondents in the above-mentioned O.A. are juniors to B.Krupavathy.

Subsequent to the above decision of the Government in the representation/appeal by B.Krupavathy, the petitioner in this writ petition made a representation to the 3rd

respondent asserting that she is senior to the 1st respondent herein and that her case also should be treated on par with the case of B.Krupavathy.

The 3rd respondent by his proceedings dated 11.03.2003 issued proceedings purported to revise the entire seniority list of 29 persons referred to earlier and in such revised seniority list appended to the said proceedings the petitioner is shown at Sl.No.3 in the seniority list whereas the 1st respondent is at Sl.No.4.

In the interregnum, the petitioner, 1st respondent, B.Krupavathy and six other staff nurses came to be promoted as Head Nurses at various points of time commencing from 13.10.1997 and the third respondent also prepared a seniority list of the Head Nurses in Zone-IV vide his proceedings dated 12.09.2003. In the said list, the petitioner is shown to be senior to the 1st respondent. Aggrieved by the same, the 1st respondent herein approached the A.P. Administrative Tribunal by filing O.A.No.7465 of 2003. The petitioner and the above-mentioned B.Krupavathy were also impleaded as respondents in the said O.A. as both of them were shown to be senior to the 1st respondent. The said O.A. was allowed holding that the 1st respondent to be senior to the writ petitioner in both the categories as Staff Nurse and Head Nurse. Insofar as the B.Krupavathy is concerned, the O.A. was dismissed. Aggrieved by the same, the present writ petition is filed.

Learned counsel for the petitioner Sri V.Jagapathi submitted that the petitioned joined the service initially as staff nurse on 16.06.1979, whereas the 1st respondent joined the service on 17.06.1979. Both in the provisional seniority list dated 11.02.1999 and final seniority list dated 24.03.1999, the seniority is indicated basing on the date on which each one of the candidates actually reported to duty except in the cases of the petitioner, 1st respondent, G.Kanakamma and G.Gnanamma. It is to be mentioned here that both B.M.V.Krupavathy and the petitioner herein reported to duty on 16.06.1979, whereas the 1st respondent reported to duty on 17.06.1979, and the above-mentioned G.Kanakamma and G.Gnanamma reported to duty on 18.06.1979 and 01.10.1979 respectively. Though the petitioner and others raised objections to the provisional seniority list, which was prepared without any definite principle, the objections were over-ruled. Since the principle involved in fixing the seniority list was settled in the case of B.M.V.Krupavathy, the petitioner claims that the same principle has to be applied to her and as such, she made a representation to the 3rd respondent and the 3rd respondent considering the principle laid down in B.M.V.Krupavathy's case thought it fit to revise the entire seniority list of all the 29 persons mentioned above, and therefore, the Tribunal was in error in interfering with such seniority list and giving a declaration in favour of the 1st respondent as prayed for.

On the other hand, learned counsel for the respondents Sri K.G.Krishna Murthy argued that the petitioner herein never chose to challenge the final seniority list dated 24.03.1999 and therefore she is estopped from questioning the correctness of the said seniority list now. He also submitted that the proceedings dated 11.03.2003 of the 3rd respondent are illegal and void on the ground that the 3rd respondent utterly lacks the jurisdiction to issue such proceedings apart from the fact that such proceedings came to be issued without any notice either to the 1st respondent or any one of the other 27 members whose seniority was revised.

It is to be noticed here that nether the Andhra Pradesh Insurance Medical Subordinate Service Rules nor the Andhra Pradesh Nursing Service Rules of 1965 indicate any principle as to the fixation of seniority with reference to any category of the posts included in the said service. In the absence of any such indication, the only principle governing the fixation of inter se seniority of employees of a particular category of service is contained in the Andhra Pradesh State & Subordinate Service Rules, 1996 framed under Article 309 of the Constitution of India, which is admittedly applicable to the employees of the State in the absence of any special rule dealing with such situation. Rule-33 of the said Rules reads as follows:

> "33. Seniority :-- (a) The seniority of a person in a service, class, category or grade, shall unless he had been reduced to a lower rank as a punishment, be determined by the date of his first appointment to such service, class, category or grade."

It can be seen from the above that the seniority of such employees has to be determined by the date of the first appointment in such service, though the expression 'first appointment' to the service is not defined, Rule-2, sub-rule (2) of the State and Subordinate Service Rules, 1966, which reads as follows:

> "2 (2) Appointed to a service:-- A person is said to be 'appointed to a service' when, in accordance with these rules, except under Rule 10 and in accordance with the Special Rules or adhoc rules applicable to such service he discharges for the first time, the duties of a post borne on the cadre of such service or commences the probation, instruction or training prescribed for members thereof."

In substance, the Rule says that a person is said to have been appointed in the service on the date on which such person discharges the duties of the post for the first time.

Therefore, while fixing inter se seniority of persons belonging to some class or category of service, the date for reckoning the seniority of such employee is the date on which a person so appointed discharges the duties attached to the post.

However, the Government while disposing of the appeal filed by B.M.V.Krupavathi did not indicate any principle on the basis of which the appeal was allowed, though on an examination of the Rules, we are satisfied that the conclusions reached by the Government are right. But,, the question that still remains is whether the conclusion reached in appeal filed by B.M.V.Krupavathi could be made applicable to all others who have never questioned the final seniority list dated 24.03.1999, is required to be examined.

Under Rule 26 of the A.P. State & Subordinate Service Rules, 1996, an appeal is provided to the employees, who are aggrieved by any seniority list prepared by the State, to the authority to whom an appeal would lie if the order of dismissal were to be passed against such member of the service. However, under sub-rule (d) a limitation of 90 days for preferring such an appeal is provided in certain contingencies. Sub-rule (d) reads as follows:

> "(d) No appeal for restoration of seniority or assignment of notional seniority on par with his junior shall be entertained by the appellate authority after a period of 90 days from the date on which junior was promoted."

Whether the limitation in filing the appeal applies in case of every kind of grievance against the seniority or such a limitation applies only in those cases where the junior had been promoted, is a moot question, and we do not propose to go into said question in this case.

In the normal course, the decision such as the one taken on the representation made by the petitioner after a period of more than three years after the publication of the final seniority list is not be enforced by a judicial body on the principle that those who sleep over their rights, are not entitled to any relief from a Court of law. Apart from that, the decision to consider the grievance of the petitioner regarding her seniority over the 1st respondent is taken by the 3rd respondent and in the process, he revised the entire seniority list of all the 29 persons. Incidentally, the question whether the 3rd respondent has the necessary jurisdiction to entertain the issue irrespective of the fact whether the issue was brought before him within the period of limitation prescribed by law is also one of the questions raised before us.

Under the Andhra Pradesh Insurance Medical Subordinate Service Rules, the appointing authority, for both the post of Staff Nurse and Head Nurse is the Director of Insurance Medical Services – 3rd respondent herein. The Rules regarding the conduct and discipline of these personnel services are called the Andhra Pradesh Civil Services (Classification, Control and Appeal) Rules, 1991. Dismissal from the service is one of the penalties prescribed under Rule-9 of Rules, 1991. Under Rule-34 when such an order of dismissal is passed, an appeal is provided to the Government or the Head of the Department if such an order is passed by the authority lower than the Department.

The issue is whether an appeal regarding the fixation of seniority of members of the service would lie to the 3rd respondent. Necessarily the 3rd respondent could not be the appellate authority, if an order of dismissal were to be passed against the parties involved in this litigation. The 3rd respondent cannot entertain an appeal because an order of dismissal of the parties herein could not have been passed by any other officer subordinate to the 3rd respondent as the 3rd respondent is the appointing authority. Even assuming (though no specific material is provided before the Court) that the 3rd respondent is the Head of the Department within the meaning of Rule-34, and therefore, he could entertain the appeal against the order of dismissal if such an order of dismissal were to be passed by some authority subordinate to it in an appropriate case. In the instant case, the 3rd respondent being the appointing authority, obviously cannot entertain an appeal against the order of dismissal passed by him and therefore even in a matter of dispute of seniority of the members of the service of which he is the appointing authority, he cannot entertain an appeal.

Learned counsel for the petitioner Sri V.Jagapathi, however, argued that under Rule-26(b) of the A.P. State and Subordinate Service Rules, the Head of the Department (as mentioned earlier we presume that the 3rd respondent is the Head of the Department) is also competent to entertain an appeal, if he is not the appellate authority. The language of Rule-26(b) is as follows:

> "26(b) The powers in sub-rule(a) shall be exercised by the head of the department, if he is not the appellate authority, or by the State Government on its own motion, or on an appeal received by the head of the department or the State Government, as the case may be."

It is rather difficult to understand what is exactly sought to be conveyed by the language of Rule-26(b). But, in our view, the said Rule must be read in consonance with Rule-33. Apart from that, the construction of Rule-26(b) enabling the 3rd respondent to entertain an appeal in the matters of disputes regarding the inter se seniority of the members of service of which he is the appointing authority and also the authority who decides the seniority initially, would simply be an appeal provided, before the same authority and would be inconsistent with the principle "*nemo debet esse judex in causa propria sua*',

one of the basic principles of natural justice. Accepting the construction that the 3rd respondent would be competent to hear an appeal in a matters of inter se seniority dispute of the members of the service would mean that the 3rd respondent would be competent to decide the correctness or otherwise of his own decision to fix the seniority. A proposition plainly against the settled principles of law of natural justice, and therefore, the submission of the learned counsel for the petitioner Sri V.Jagapathy is rejected, and as such, the proceedings dated 11.03.2003 which are the subject matter of challenge must be held to be without jurisdiction and therefore *non est* in the eye of law.

It is required to be held so even on another ground that the proceedings dated 11.03.2003 by which the seniority list prepared as on 24.03.1999, was revised are the proceedings without notice to any one of the affected parties, and therefore, void on account of the violation of the legal principle *audi alteram partem*.

The learned counsel for the respondents Sri K.G.Krishna Murthy submitted that except the 1st respondent, none of the other members of the service in question challenged the proceedings dated 11.03.2003, the dispute is only between the petitioner and the 1st respondent, and therefore, such declaration of the proceedings dated 11.03.2003 insofar as all the members covered by the revised seniority list are concerned is not required to be given and it has to be confined to the parties to the present writ petition only. We regret our inability to accept the submission for these reasons:

In view of our conclusion that the proceedings dated 11.03.2003 are the proceedings without any jurisdiction and in violation of the principles of natural justice, the enforceability of such proceedings could be challenged by the affected party whenever such proceedings are sought to be pressed into service. The law on this aspect is settled that the validity or legality of an order without jurisdiction can even be raised in collateral proceedings. Therefore, nothing prevents any one of the 29 members shown in the said seniority list from approaching the appropriate legal forum, subject of course to various procedural Rules. Even the grounds of laches and limitation are also required to give way when such challenge is raised, since admittedly the proceedings were issued without any prior notice to the persons affected. Therefore, limiting such declaration only to the parties to the present writ petition would only result in proliferation of litigation and would not be either in the interest of any one of the members of the service or the larger public interest.

For all the above-mentioned reasons, the proceedings dated 11.03.2003 of the 3rd respondent by which the seniority list of the Nurses in Zone-IV is revised, are declared void and illegal and consequently the proceedings of the 3rd respondent dated 12.09.2003 are also set aside. The petitioner, 1st respondent and the remaining 27 Nurses of Zone-IV are at liberty to prefer an appeal to the Government regarding the correctness of the final seniority list dated 24.03.1999. Since the other members of the said service are not before this Court,

we deem it appropriate to direct the 3rd respondent to inform all the 29 members of the service whose names are included in the final seniority list dated 24.09.1999 about their right to prefer an appeal within a period of 30 days from the date of receipt of a copy of this order and on such notice, any one of them is entitled to prefer an appeal within a period of 30 days therefrom. Upon receipt of any such appeal or appeals, the Government will have to dispose of the same in accordance with law, as expeditiously as possible, preferably within a period of four months from the date of receipt of the first appeal, even if there is more than one appeal.

With the above directions, the writ petition is disposed of. There shall be no order as to costs.

JUSTICE J.CHELAMESWAR

JUSTICE M.VENKATESWARA REDDY

24th MARCH, 2006

PGS

THE HON'BLE MR JUSTICE

J.CHELAMESWAR

AND
THE HON'BLE MR JUSTICE

M.VENKATESWARA REDDY

WRIT PETITION No.23113 OF 2004

(Per Sri Justice J.Chelameswar)

24th MARCH, 2006